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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1583

ALLSTATE INSURANCE COMPANY,
AN ILLINOIS CORPORATION,
Petitioner,

vs.

FRANK J. KELLEY, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

Petitioner, Allstate Insurance Company ("Allstate"), prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Michigan entered in this action on June 8, 1978.[1]

1. The respondents to this petition are: Frank J. Kelley, Attorney General of the State of Michigan, Richard H. Austin, Secretary of State of Michigan, Jean Carlson, Acting Commissioner of Insurance of the State of Michigan, Aetna Casualty & Surety Company, Travelers Indemnity Company, Hartford Accident & Indemnity Company, Continental Casualty Company, Home Indemnity Company, League General Insurance Company, State Farm Mutual Automobile Insurance Company, Detroit Automobile Inter-Insurance Exchange and Riverside Insurance Company of America, all of whom were defendants below, and Catherine Shavers, James A. Jachim, Eric Gentile, Gregory Hicks, Mel Janasevich, John Shano,

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OPINIONS BELOW

The opinion of the Michigan Supreme Court is officially reported *sub nom. Shavers* v. *Attorney General* at 402 Mich. 554, unofficially reported at 267 N.W.2d 72, and reproduced in official form in Appendix A. The opinion of the Court of Appeals of Michigan is officially reported at 65 Mich. App. 355, unofficially reported at 237 N.W.2d 325, and reproduced in official form in Appendix E. The opinion of the Circuit Court for the County of Wayne, State of Michigan, which is unreported, is reproduced in Appendix F.

JURISDICTION

The final judgment of the Michigan Supreme Court was entered on June 8, 1978. The Michigan Supreme Court denied a timely application for rehearing on December 1, 1978. On February 16, 1979, Mr. Justice Stewart entered an order extending the time for filing this petition for a writ of certiorari to and including April 15, 1979. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Several Michigan residents brought a class action to challenge the constitutionality of numerous provisions of the Michigan No-Fault Insurance Act ("Act"). The case was tried to judgment, reviewed by the Court of Appeals of Michigan, and appealed to the Supreme Court of Michigan without any party ever raising, briefing, or arguing whether private insurers marketing the compulsory no-fault coverages required by the Act must

(Footnote continued from preceding page.)
Raymond Hullum, Cleveland Clavon, Steven Makela, Linda Chamberlin, John Savard, Mary J. Weinbaum, Connie Stuckey, Marie Spearman, Theodore Spearman, Barbara Grosvenor, Robert Grosvenor, and Ina Zeemering, plaintiffs below.

afford procedural due process protection to prospective policyholders. Yet, considering this issue *sua sponte*, the Michigan Supreme Court held that the insurers engage in state action and are therefore bound by the Due Process Clause of the Fourteenth Amendment.

The question presented is whether privately owned insurance companies which provide the no-fault automobile coverages required by Section 3101(1) of the Act engage in state action so as to subject them to the requirements of the Due Process Clause of the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(a) The Fourteenth Amendment to the United States Constitution, Section 1 of which provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(b) Mich. Comp. Laws §§ 500.2400-500.2484 and 500.3101-500.3380, which are set forth in full in Appendix H.[2]

2. The statutory sections contained in Appendix H are in the form considered by the Michigan Supreme Court in reaching its decisions, since those are the statutes involved in this Petition. Four sections, not relevant to the issues raised herein, have since been amended by the Michigan legislature: Mich. Comp. Laws §§ 500.3108, 500.3116, 500.3123, and 500.3131. In addition, § 500.3104, which also has no impact on the issues raised herein, has been added. That section provides for the establishment of a "catastrophic claims association" to spread the risk of disastrous losses among all companies writing automobile insurance in Michigan.

STATEMENT OF THE CASE

The Act,[3] which became law on October 1, 1973, requires owners and registrants of motor vehicles in Michigan to "maintain security for payment of benefits under" certain specified no-fault insurance coverages. Mich. Comp. Laws § 500.3101(1) (App. H, p. A290). On August 28, 1973, a class action was filed against 25 automobile insurers (including Allstate) and various Michigan public officials in the Circuit Court for the County of Wayne, State of Michigan challenging the constitutionality of the Act on a number of grounds and seeking declaratory and injunctive relief preventing its enforcement. On May 20, 1974, the trial court issued a 116-page opinion in which it held, *inter alia*, that the legislature did not exceed its police power in enacting Section 3101(1) of the Act. App. F, pp. A191-A192. Although the court declared certain severable portions of the Act unconstitutional,[4] it did not consider whether Section 3101(1) denied procedural due process, presumably because no party had ever made such a claim in its pleadings or during the 2½ month trial of the case.

Many parties appealed, but none questioned the trial court's determination that Section 3101(1) was constitutional. On November 5, 1975, the Court of Appeals of Michigan affirmed in part and reversed in part.[5]

3. Mich. Comp. Laws §§ 500.3101-500.3179. The introduction to Appendix H summarizes the provisions of the Act, as well as the related provisions found in Mich. Comp. Laws §§ 500.2400-500.2484 and 500.3204-500.3380. The Act together with the related provisions are referred to hereinafter as "the Michigan statutes."

4. The trial court found Sections 3101(2), 3107(b), 3109(1), 3109(3) and 3113 of the Act unconstitutional. App. F, pp. A215-A219, A225-A229, A230-A235, A235-A240, and A241-A242, respectively. It also determined that the Act's personal injury protection scheme was constitutional, but that its property damage protection scheme was unconstitutional. App. F, pp. A192-A215.

5. 65 Mich. App. 355, 237 N.W.2d 325 (App. E). The court of appeals affirmed the trial court's judgment as to the personal

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Plaintiffs obtained leave to appeal to the Michigan Supreme Court. Because the Act "profoundly and importantly affects a crucial dimension of our lives," the supreme court declared that it felt "compelled to address" the procedural due process sufficiency of Section 3101(1) even though the court of appeals had not done so and no party had raised this issue at any point in the proceedings. *Shavers, supra,* 402 Mich. at 590, 593-94 n.14, 267 N.W.2d at 82, 84-85 n.14 (App. A, pp. A13, A16-A18 n.14).[6] Thus, on June 8, 1978, in an opinion written by Justice G. Mennen Williams, the Michigan Supreme Court upheld the Act as a valid exercise of the legislature's police power, but ruled *sua sponte,* by a four-to-three majority, that Section 3101(1) was unconstitutional because it denied procedural due process.

The predicate of the court's decision to impose due process obligations upon Michigan automobile insurers was the majority's determination that the activities of such companies constitute state action.[7] The court's entire discussion of state action consisted of the following:

(Footnote continued from preceding page.)

injury and property damage schemes, and overruled the judgment as to Section 3101(2). 65 Mich. App. at 363-72, 237 N.W.2d at 331-35 (App. E, pp. A159-A167). The primary divergence of opinion between the trial and appellate courts was over the plaintiffs' standing to contest the Act. *See* 65 Mich. App. at 361-63, 237 N.W.2d at 330-31 (App. E, pp. A158-A159).

6. As noted by the Michigan Supreme Court in its footnote 14, several parties discussed the substantive due process issue of the state legislature's police power to enact no-fault insurance statutes in their briefs before that court. However, as all three dissenting Justices pointed out, no one addressed the issue of procedural due process on which the Michigan Supreme Court ultimately ruled. *Shavers, supra,* 402 Mich. at 641-43, 267 N.W.2d at 107-08 (App. A, pp. A62-A64) (Ryan, J.); 402 Mich. at 666-67, 267 N.W.2d at 118-19 (App. A, p. A85) (Fitzgerald, J.); 402 Mich. at 673, 267 N.W.2d at 122 (App. A, p. A91) (Coleman, J.).

7. After the Michigan Supreme Court raised and decided the state action issue, it was properly preserved for review by being argued in the Application for Rehearing filed below by several defendants, including Allstate. App. C, pp. A117-A120.

"The protections of the due process clause can only be invoked when there has been state action. *Jackson* v. *Metropolitan Edison Co,* 419 US 345, 349-350; 95 S Ct 449; 42 L Ed 2d 477 (1974).

"The No-Fault Act compels insurance for all motor vehicles; failure to comply with this requirement may result in criminal and civil sanctions. In addition, the No-Fault Act specifies the extent of coverage to be provided and the conditions of payment for insurance benefits. Finally, the No-Fault Act and the Insurance Code provide for the assignment of claims and risks. In effect, insurance companies are the instruments through which the Legislature carries out a scheme of general welfare. This legislation goes beyond a grant of a monopoly or an attempt to regulate a utility; there exists 'a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the [regulated entity] may fairly be treated as that of the State itself'. *Jackson* v. *Metropolitan Edison Co, supra,* 419 US 345, 351." *Shavers, supra,* 402 Mich. at 597, 267 N.W.2d at 86 (App. A, pp. A20-A21). (Footnotes omitted.)[8]

Having found the requisite state action, the court held that Section 3101(1) violated the Due Process Clause of the Fourteenth Amendment because the Michigan statutes failed to provide sufficient procedural safeguards for insureds regarding the insurers' conduct in setting rates for the no-fault coverages, refusing to write or renew such coverages, and cancelling policies containing such coverages during their term. *Shavers, supra,* 402

8. Although the Michigan Supreme Court cited both the Michigan and the United States Constitutions in its opinion, the state action holding rested solely upon this Court's decision in *Jackson* v. *Metropolitan Edison Co,* 419 U.S. 345 (1974). The court below relied upon neither the Michigan Constitution nor any Michigan case law in its discussion of state action. Thus, the court either decided the issue solely pursuant to the United States Constitution, or, at least, ". . . felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did." *Zacchini* v. *Scripps-Howard Broadcasting Co.,* 433 U.S. 562, 568 (1977). In either event, this court has jurisdiction to decide the federal issue. *Id.*; *State of Missouri* v. *Mayfield,* 340 U.S. 1, 5 (1950).

Mich. at 600-05, 267 N.W.2d at 87-91 (App. A, pp. A23-A28). The court held that Michigan residents have a statutorily protected interest in no-fault insurance at "fair and equitable" rates; that this interest is entitled to due process protection; and that privately owned insurance companies writing no-fault insurance have a constitutional obligation to provide such protection. *Shavers, supra,* 402 Mich. at 600, 267 N.W.2d at 87 (App. A, p. A23).

On the assumption that "the Legislature and the Commissioner of Insurance will seek to remedy the constitutional deficiencies articulated" in the opinion, the court provided that its declaration that Section 3101(1) is unconstitutional would not become effective until 18 months after the issuance of its opinion.[9] *Shavers, supra,* 402 Mich. at 608-09, 267 N.W.2d at 91-92 (App. A, p. A31). Thus, if the alleged deficiencies are not remedied within this period, the court's decree will automatically become effective on December 8, 1979.[10]

9. Until the legislature or Commissioner of Insurance provides the due process safeguards required by the Michigan Supreme Court, the Commissioner is directed by the court to:

". . . actively enforce the present regulatory scheme in the spirit of our opinion in order to assure the availability of no-fault insurance at fair and equitable rates during this period." *Shavers, supra,* 402 Mich. at 611, 267 N.W.2d at 92-93 (App. A, p. A33).

To date, more than ten months after the Michigan Supreme Court's mandate, no legislation or administrative rules have been promulgated correcting the supposed due process deficiencies of the Act, although proposed amendments to the Act and agency regulations are under consideration.

10. Despite the eighteen month grace period, the Michigan Supreme Court's decision is "final" within the meaning of 28 U.S.C. § 1257 and therefore reviewable by this Court. Any additional proceedings will concern only amendments to the Act or new regulations promulgated by the Commissioner. The underlying decision that private insurance companies are engaged in state action and must therefore accord insureds procedural due process is now conclusive and will survive any such proceedings. *See Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469, 480 (1975). Indeed, the finding of state action is the reason for such further proceedings. Thus, this

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REASONS FOR GRANTING THE WRIT

A bare majority of the Michigan Supreme Court, acting *sua sponte*, has rendered the first reported decision by any court holding that private insurers who furnish any form of compulsory insurance, no-fault or otherwise, become an arm of the state by doing so. Their decision conflicts with the holdings of this Court defining those activities of private persons which constitute state action. *See, e.g., Jackson* v. *Metropolitan Edison Co*, 419 U.S. 345 (1974); *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149 (1978); *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972). By ignoring this Court's holdings, the Michigan Supreme Court has adopted an expansive concept of state action which threatens to subject insurance companies and other similarly regulated industries, such as utilities, banks and common carriers, throughout the United States to the overwhelming burden of providing formal notice and adversary hearings at every stage of their routine business transactions, with the inevitable result of increasing the cost of the services provided by those businesses. These consequences can be prevented only by this Court's review and reversal of the ruling below.

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Court's present review of the decision below would serve the interests of judicial economy, by obviating further litigation if it is determined that the Michigan Supreme Court has erred. *See Id.* at 477-78 (1975); and *Mills* v. *Alabama*, 384 U.S. 214, 217-18 (1966).

Nor is the finality of the judgment below impaired by the fact that the Michigan Supreme Court remanded some issues for further resolution. *See* Parts VIII and IX of its opinion, 402 Mich. at 634-38, 267 N.W.2d at 104-06 (App. A, pp. A56-A59). The issues remanded are severable from the question presented here. *Shavers, supra*, 402 Mich. at 638 n.66, 267 N.W.2d at 106 n.66 (App. A, p. A59 n.66). Moreover, they have now been disposed of on remand. *See* the trial court's order of February 13, 1979 entered pursuant to the stipulation of the parties. App. G, p. A256. Therefore, they do not affect the finality of the decision as to the constitutionality of Section 3101(1) of the Act. *See Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 557-58 (1963); *Construction Laborers* v. *Curry*, 371 U.S. 542, 548-52 (1963).

I. THE MICHIGAN SUPREME COURT'S HOLDING THAT PRIVATE INSURERS ENGAGE IN STATE ACTION BY MARKETING NO-FAULT INSURANCE CONFLICTS WITH THIS COURT'S RECENT DECISIONS ON STATE ACTION.

It is settled law that the Fourteenth Amendment constrains only state action. *The Civil Rights Cases*, 109 U.S. 3, 11-18 (1883). This restriction serves a critical function in our constitutional scheme:

> "[B]y exempting private action from the reach of the Constitution's prohibitions [the state action limitation] stops the Constitution short of preempting individual liberty—of denying to individuals the freedom to make certain choices, . . ." Tribe, *American Constitutional Law*, at 1149 (1978).

This Court has repeatedly recognized that the boundaries of the state action limitation must be drawn so as to effectuate this purpose. Thus, "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment." *Jackson, supra*, 419 U.S. at 350. *Accord, Moose Lodge, supra*, 407 U.S. at 173, 176-77. When private actions, such as the commercial decisions of a regulated business, are challenged under the Due Process Clause, "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson, supra*, 419 U.S. at 351. Although the Michigan Supreme Court correctly stated the *Jackson* rule (*Shavers, supra*, 402 Mich. at 597, 267 N.W.2d at 86 (App. A, p. A21)), it incorrectly applied it in concluding that the conduct of private automobile insurance companies marketing no-fault insurance in Michigan involves state action.

This Court has articulated three tests for determining which activities of non-governmental entities constitute state action: (1) whether there is sufficient state involvement in the chal-

lenged conduct to establish a factual nexus between the private party and the state (*see, e.g., Jackson, supra,* 419 U.S. at 351-52); (2) whether the private conduct at issue involves the performance of a public function (*see, e.g., Flagg Bros., supra,* 436 U.S. at 157-58); and (3) whether the challenged private conduct is governmentally compelled or receives a sufficiently high level of official encouragement (*see, e.g., Moose Lodge, supra,* 407 U.S. at 176-78). The conduct of automobile no-fault insurers under the Act meets none of these tests.

A. The Nexus Between the State of Michigan and the Activities of Private No-Fault Insurers Is Not Sufficiently Close to Treat the Insurers' Actions as Those of the State.

The holding below conflicts most sharply with *Jackson,* the principal decision of this Court examining the nexus between a regulated business and the state and the only precedent cited by the Michigan Supreme Court. In *Jackson* the plaintiff's electric power service was terminated for alleged non-payment. She sued Metropolitan Edison under 42 U.S.C. § 1983 charging that termination without notice or hearing denied her due process. This Court affirmed the dismissal of the petitioner's complaint, holding that:

> ". . . the State of Pennsylvania [was] not sufficiently connected with [Edison's] action in terminating petitioner's service so as to make [Edison's] conduct in so doing attributable to the State for purposes of the Fourteenth Amendment." 419 U.S. at 358-59.

Metropolitan Edison, unlike privately owned no-fault insurers, was defined by statute as a public utility. *See* Pa. Stat. Ann. tit. 66, § 1102(17). For purposes of its decision in *Jackson,* this Court assumed that Edison enjoyed a local monopoly protected by state law (419 U.S. at 351-52), whereas over 280 automobile insurers compete with one another in Michigan.[11] Edison was at least as heavily regulated as are

11. *See* the January 22, 1974 trial testimony of Robert Rowe, then Chief Deputy Insurance Commissioner of the State of Michigan (Tr. 773-74).

the Michigan automobile insurers. Its rates were set by approval of a general tariff filed with the Pennsylvania Public Utilities Commission, just as Allstate's premium rates are set by approval of a schedule filed with the Michigan Commissioner of Insurance.[12] Moreover, Edison's procedures for terminating its electrical service to customers were embodied in the general tariff approved by the Pennsylvania Commission, just as Allstate's procedures and practices for cancelling or refusing to renew its insureds' policies are embodied in policy forms approved by the Michigan Commissioner.[13]

In short, neither the Michigan Supreme Court's conclusion that Section 3101(1) makes no-fault insurance compulsory for every owner or registrant of a motor vehicle in the State[14] (402 Mich. at 593-94, 267 N.W.2d at 84-85 (App. A, pp. A16-

12. Edison's ratemaking procedure was governed by the Pennsylvania Public Utilities Code. Pa. Stat. Ann., tit. 66, §§ 1141-1153. Michigan automobile insurance ratemaking is governed by Mich. Comp. Laws §§ 500.2406, 500.2430 (App. H, pp. A265-A266, A270-A271).

Under the Michigan statutes, automobile insurers set their own rates subject to review and disapproval by the Insurance Commissioner if he finds them contrary to law. Mich. Comp. Laws §§ 500.2406, 500.2430 (App. H, pp. A265-A266, A270-A271). This procedure is substantively identical to the tariff approval procedure which in *Jackson* was held insufficient to convert Edison's private conduct into state action. 419 U.S. at 354-55.

13. Michigan Insurance Department Bulletin AD 74-2 (April 15, 1974) requires all automobile insurers to file their policy forms with the Commissioner of Insurance before putting them into service. Allstate's filed policy forms contain its cancellation and non-renewal procedures, although Michigan law does not require them to be set forth in the policy. Like Edison's tariff in *Jackson,* the forms are deemed approved unless the Commissioner affirmatively disapproves them.

14. This conclusion is inaccurate, since the Act requires only that such an individual "maintain security for payment of benefits under" the no-fault insurance coverages. Section 3101(1) (App. H, p. A290). While purchasing a policy of insurance containing these coverages, as permitted by Section 3101(3) (App. H, p. A291), may be the most common way of satisfying this requirement, the maintenance of "security equivalent to that afforded by a policy of insurance," such as a bond, is expressly authorized by Section

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A17)), nor its observation that ". . . the independent mobility provided by an automobile is a crucial, practical necessity . . ."[15] (402 Mich. at 598, 267 N.W.2d at 87 (App. A, p. A21)), creates a "nexus" which distinguishes the present case from *Jackson*. Metropolitan Edison's monopoly compelled its customers to purchase from Edison a commodity which is a greater "necessity" than owning a motor vehicle. Yet, without even attempting to distinguish *Jackson's* holding that Edison's conduct was not state action, the court below summarily held that there was sufficient state involvement to support the conclusion that no-fault insurers are subject to the Due Process Clause.

The conflict between the decision below and the rulings of this Court is underscored by the Ninth Circuit's recent holding that insurance companies writing disability coverage in California were not acting "under color of state law" so as to subject them to suit under 42 U.S.C. § 1983.[16] *Life Insurance Co. of North America* v. *Reichardt*, 591 F.2d 499 (9th Cir. 1979). That case was a civil rights class action alleging that disability policies written by defendants and approved by the California

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3101(4) (App. H, p. A291). Thus, a motorist need not purchase insurance to own or register a motor vehicle in Michigan.

Furthermore, the Act does not proscribe the operation of an automobile by anyone who does not maintain the requisite security, but rather forbids only the ownership or registration of an unsecured vehicle. Section 3101(1) (App. H, p. A290). Thus, an individual is free to lease, rent or borrow and drive any vehicle for which the security is properly maintained by the owner.

15. This Court has already held that a "driver's license clearly does not rise to the level of 'necessity' exemplified by wages and welfare benefits . . . . While a driver's license, for example, 'may become [indirectly] essential in the pursuit of a livelihood,' . . . a stove or a bed may be equally essential to provide a minimally decent environment for human beings in their day-to-day lives." *Fuentes* v. *Shevin*, 407 U.S. 67, 89 (1972), quoting *Bell* v. *Burson*, 402 U.S. 535, 539 (1971). (Brackets in original.)

16. The statutory prerequisite of action "under color of state law" is equivalent to the Fourteenth Amendment requirement of state action, as evidenced by the treatment accorded the two doctrines in *Jackson, supra.*

State Insurance Commission discriminated against women "who cannot obtain coverage for as long a period, must wait longer for benefits, and are charged higher premiums than men." *Id.* at 500. Affirming dismissal of the § 1983 claim against the insurers, the Ninth Circuit held that under the relevant state action decisions of this Court there was neither sufficient nexus between California and the challenged conduct nor sufficient official encouragement of that conduct to render it state action. *Id.* at 501-02. The state approval of the allegedly discriminatory policies was not sufficient because ". . . the Commissioner's approval was pro forma as in *Jackson* rather than an approval after full investigation. . . ." *Id.* at 502. Allstate's policies and rate schedules receive exactly the same "pro forma approval" from the Michigan Insurance Commissioner. Thus, although *Reichardt* involved voluntary insurance rather than the "compulsory" coverages at issue here, the Ninth Circuit's analysis of the relevant holdings of this Court demonstrates the error of the Michigan Supreme Court.

B. Insurers Providing No-Fault Coverage Do Not Perform a Public Function Which Has Traditionally Been Performed Exclusively by the State.

When the court below stated that "insurance companies are the instruments through which the Legislature carries out a scheme of general welfare" (*Shavers, supra,* 402 Mich. at 597, 267 N.W.2d at 86 (App. A, pp. A20-A21)), it may have intended to suggest a public function rationale for its state action holding. Such a suggestion, however, is contrary to the decisions of this Court.

It is true that a sufficient nexus to establish state action will be found where a private decision-maker is performing a function which has traditionally been the exclusive prerogative of the sovereign. *See* the discussion and cases cited in *Jackson, supra,* 419 U.S. at 352-53; *Flagg Bros., supra,* 436 U.S. at 157-64. However, in *Jackson,* despite the fact that Pennsylvania was plainly carrying out "a scheme of general welfare" by

granting an electric power monopoly to Metropolitan Edison, this Court explicitly rejected the argument that Edison was performing a public function. The Court held that the provision of electric power is not a traditional function of the sovereign and thus Edison's conduct was not state action:

> "If we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one. But while the Pennsylvania statute imposes an obligation to furnish service on regulated utilities, it imposes no such obligation on the State." 419 U.S. at 352-53.

More recently, in *Flagg Bros.*, this Court held that a warehouse which satisfied its lien by private sale under the provisions of Uniform Commercial Code ("UCC") Section 7-210, as enacted by the New York legislature, was not involved in state action because ". . . the settlement of disputes between debtors and creditors is not traditionally an *exclusive* public function." 436 U.S. at 161. (Emphasis supplied; footnote omitted.)[17]

Automobile insurance is not and never has been an exclusive function of the state.[18] It is not even traditionally associated with the sovereign.[19] Under the Act, the State of Michigan

17. The Michigan Supreme Court's suggested expansion of the public function rationale into the business of insurance is in direct conflict with this Court's stated intentions in *Flagg Bros.*:

> "Thus, even if we were inclined to extend the sovereign function doctrine outside of its present carefully confined bounds, the field of private commercial transactions would be a particularly inappropriate area into which to expand it." 436 U.S. at 163.

18. *Compare* the activities of private automobile insurers *with* the actions of private parties which have been held to constitute performance of a public function, such as the conduct of all municipal functions by a company town (*Marsh* v. *Alabama*, 326 U.S. 501 (1946)) and the conduct of a primary election for public office by a private political club (*Terry* v. *Adams*, 345 U.S. 461 (1953)).

19. In their dissent in *Flagg Bros., supra*, 436 U.S. at 171, Justices Stevens, Marshall and White rejected the Court's exclusivity requirement and defined a public function for purposes of the Due

(Footnote continued on next page.)

does not assume the duty of providing automobile insurance to its citizens. Therefore, the marketing of automobile insurance is not a public function and private insurers are not involved in state action under this standard.

C. The Act Does Not Compel or Encourage the Challenged Conduct of Insurance Companies so as to Transform That Conduct Into State Action.

This Court has found that private parties engage in state action in certain cases where state law compelled the conduct being challenged as violative of the Due Process Clause (*see, e.g., Petersen* v. *City of Greenville*, 373 U.S. 244, 247-48 (1963)) or where agents of the state prompted or encouraged parties to peform the challenged acts (*see, e.g., Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 170-71 (1970); *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 721-25 (1961)).[20] While not explicitly citing or relying on the official compulsion or encouragement doctrine, the opinion below can be read to suggest that the Michigan statutes provide sufficient official compulsion to transform the conduct of private insurers into state action.[21] *Shavers, supra*, 402 Mich. at 598, 267 N.W.2d at 87 (App. A, p. A21). Any such suggestion is erroneous. *See Jackson, supra*, 419 U.S. at 354-58; *Flagg Bros., supra*, 436 U.S. at 164-66; *Moose Lodge, supra*, 407 U.S. at 175-77.

The inapplicability of the official compulsion rationale in this case is manifest from a comparison with *Jackson*, where the

(Footnote continued from preceding page.)

Process Clause as one "traditionally and historically associated with sovereignty." Automobile insurance clearly does not satisfy even this minimal test.

20. In each of these cases, as well as in all others where this Court has found state action on the basis of official compulsion or encouragement, the challenged conduct was racial discrimination.

21. The Michigan Supreme Court specifically noted that the Act specifies the extent of coverage to be provided and the conditions of payment for insurance benefits, and that it "provide[s] for the assignment of claims and risks." *Shavers, supra*, 402 Mich. at 597, 267 N.W.2d at 86 (App. A, p. A20).

challenged termination policies were embodied in a tariff approved by the Pennsylvania Public Utilities Commission. Even under those circumstances, this Court found that there was not sufficient state compulsion or encouragement of Metropolitan Edison's conduct to satisfy the state action requirement of the Due Process Clause:

> "The nature of governmental regulation of private utilities is such that a utility may frequently be required by the state regulatory scheme to obtain approval for practices a business regulated in less detail would be free to institute without any approval from a regulatory body. *Approval by a state utility Commission of such a request from a regulated utility, where the Commission has not put its own weight on the side of the proposed practice by ordering it, does not transmute a practice initiated by the utility and approved by the Commission into 'state action'.* At most, the Commission's failure to overturn this practice amounted to no more than a determination that a Pennsylvania utility was authorized to employ such a practice if it so desired. *Respondent's exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so 'state action' for purposes of the Fourteenth Amendment.*" 419 U.S. at 357. (Emphasis supplied; footnote omitted.)

Michigan's regulation of Allstate's no-fault ratemaking[22] and underwriting activities[23] is indistinguishable from Pennsylvania's

22. *See* n.12 and accompanying text *supra*, p. 11.

23. The Michigan statutes do not regulate the circumstances in which insurers may refuse to write or renew policies (except that refusal to renew without proper notice is treated by Mich. Comp. Laws § 500.3204(2) (App. H, p. A319) as cancellation). Thus, at most, the state passively tolerates the decisions of private parties by refusing to regulate them.

As to the decision to terminate a policy within the first 55 days, the Michigan statutes, like UCC § 7-210 in *Flagg Bros.*, merely announce the circumstances under which the state will not interfere with the private conduct of insurers by providing that during this period policies may be canceled without appeal by the insureds if ". . . the risk is unacceptable to the insurer." Mich. Comp. Laws §§ 500.3220(a), 500.3224(1) (App. H, p. A320). Even with

(Footnote continued on next page.)

regulation of Metropolitan Edison's ratemaking and termination activities.

The opinion below also implies that the Michigan statutory requirement that insurers provide the no-fault coverages through an assigned risk pool to any persons unable to obtain them in the voluntary market constitutes sufficient governmental compulsion to support a finding of state action. *Shavers, supra*, 402 Mich. at 597, 267 N.W.2d at 86 (App. A, pp. A20-A21). This suggestion plainly conflicts with the holdings of this Court. State action exists under the compulsion doctrine only where the court determines that the challenged conduct itself, rather than the general commercial activities of the private entity, are compelled by the state.[24] In *Jackson*, for instance, this Court rejected the contention that the challenged termination practices constituted state action under the compulsion doctrine, even though Metropolitan Edison was required by the state to furnish electric power to all consumers within the area of its monopoly (Pa. Stat. Ann. tit. 66, § 1171). *Jackson, supra*, 419 U.S. at 348 n.2, 353. Accordingly, *Jackson* is precisely analogous to the instant case; there is no distinguishing factor which can be discerned from the opinion of the court below or from the record herein.

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regard to mid-term cancellations after the policy has been in effect for more than 55 days, the Michigan statutes do not either compel or encourage insurers to terminate; rather, they merely limit the circumstances in which they may do so. Mich. Comp. Laws §§ 500.3212, 500.3220(b) (App. H, p. A320). *See also* n.13 and the accompanying text *supra*, p. 11. In any event, the Michigan laws already afford procedural due process protection to insureds whose policies are terminated after 55 days by requiring the Michigan Insurance Commissioner, not the insurance companies, to hold hearings upon the written request of the policyholders. Mich. Comp. Laws §§ 500.3230-500.3244 (App. H, pp. A321-A322).

24. *See, e.g., Petersen, supra*, 373 U.S. at 247-48 (state action found where statute compelled segregation of a restaurant); *Adickes, supra*, 398 U.S. at 170-71 (state action found where police officers enforced unofficial policy requiring segregation of eating facilities); *Burton, supra*, 365 U.S. at 721-25 (state action found where municipal parking authority was effectively a joint participant in operation of a segregated restaurant).

In *Flagg Bros.*, the Court extended its holding in *Jackson* by deciding that even where a statute expressly permitted certain private conduct, that conduct did not thereby become state action. Despite the fact that New York's commercial code allowed private sales to satisfy warehousemen's liens, the Court held that this statutory authorization of private activity did not convert the warehouseman's actions into those of the state, since:

> "The State of New York has not compelled the sale of a bailor's goods, but has merely announced the circumstances under which its courts will not interfere with a private sale. Indeed, the crux of respondents' complaint is not that the State *has* acted, but that it has *refused* to act." 436 U.S. at 166. (Emphasis in original.)

Accord, Moose Lodge, supra, 407 U.S. at 175-77.[25] Similarly, in the instant case, Michigan has "merely announced the circumstances under which its courts will not interfere with" the insurers' conduct in making and implementing the ratemaking and underwriting decisions regarding the no-fault coverages.[26]

In sum, all of the tests employed by this Court to ascertain whether the acts of private parties are to be considered state action subject to the Due Process Clause lead to the same result: the conduct of insurance companies in providing no-fault insurance in Michigan is not state action. The Michigan Supreme Court has seriously and dangerously distorted the law of state action by holding otherwise.

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25. In *Moose Lodge,* this Court held that the grant of a liquor license to a racially discriminatory club, together with concomitant regulation by the Pennsylvania Liquor Control Board, could not support a finding of state action because Pennsylvania did not compel or encourage the discrimination policy itself.

> "However detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise." 407 U.S. at 176-77.

26. *See* notes 12 and 23 *supra,* pp. 11, 16-17.

II. THE DECISION BELOW WILL HAVE A SERIOUS DETRIMENTAL IMPACT ON THE BUSINESS OF AUTOMOBILE INSURANCE, ON REGULATED INDUSTRIES IN GENERAL, AND ON THE PUBLIC.

If the decision below is permitted to stand, the operations of insurance companies in every state could be subjected to the procedural constraints of the Due Process Clause of the Fourteenth Amendment.[27] According to the Michigan Supreme Court such a requirement would, "*at a minimum,*" require, *inter alia,* that every motorist be provided with the:

> ". . . opportunity to obtain a prompt and effective administrative review of an insurer's calculation of the factors, differentials and premium applicable to him and a prompt and effective administrative review of the basis for the refusal or cancellation of insurance." *Shavers, supra,* 402 Mich. at 608, 267 N.W.2d at 91 (App. A, pp. A30-A31).

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27. There is nothing in the opinion of the Michigan Supreme Court, nor in its apparent rationale, that would confine its holding to the realm of no-fault insurance. It is the compulsory nature of the insurance, not the fact that it is no-fault, which was the basis for the court's holding. Thus, since all fifty states and the District of Columbia have some form of insurance which is compulsory under the test applied by the court below, the erroneous reasoning of the Michigan Supreme Court could be applied to impose due process obligations on private insurers throughout the country. *See* Appendix I and n.29, *infra,* p. 20.

This requirement alone would dramatically increase the expense to insurers, and thus the cost to consumers, of providing automobile insurance in Michigan[28] and other states.[29]

Additionally, if private insurance companies are deemed to be engaged in state action, they may be required throughout the United States to employ costly and time-consuming formal procedures in connection with many of their other routine business decisions, including establishment of risk classifications and even the adjustment of claims. These procedures would, of course, also add markedly to the cost of automobile insurance.

28. The additional burden and expense in Michigan cannot be quantified, but its magnitude is evident from the facts contained in the record of this case. During the fiscal year ending June 30, 1973, a total of 6,148,223 motor vehicles were registered in Michigan. *See* Secretary of State's Answers to Plaintiffs' Interrogatories. Between January 1, 1973 and October 31, 1973 (for the majority of insurance company defendants below), and December 5, 1973 (for the remainder), the defendant insurance companies issued more than 402,894 insurance policies to first-time customers in Michigan. *See* the answers of each defendant insurance company to plaintiffs' interrogatories. During the same period of one year or less, those insurance companies rejected an applicant, cancelled a policy or refused to renew a policy in more than 61,666 instances. *Id.*

29. Appendix I contains an annotated chart summarizing the relevant statutes governing insurance in the forty-nine states other than Michigan and regulations in the District of Columbia (hereafter referred to as a "state" in this note). As shown there, all of the states have some type of compulsory automobile insurance. Eighteen states have some form of compulsory no-fault insurance. Twenty-three states have compulsory third party liability insurance. The remaining jurisdictions require evidence of insurance or other security from motorists who have had accidents, committed certain violations, or failed for a specific period of time to satisfy a judgment.

Every state but Illinois regulates rates, and the vast majority do so to prevent "excessive, inadequate or unfairly discriminatory" rates, just as in Michigan. Forty-eight states permit an insured who is aggrieved by a rate decision to be heard by his insurer or the regulatory agency. However, just four states now require that a hearing be held for those who are refused insurance. Only seventeen states currently require a hearing in the event that an insurer refuses to renew a policy, and only twenty-one afford the insured a hearing if his insurance is cancelled midterm.

Thus, not one of the jurisdictions in the United States currently has a regulatory scheme which satisfies the "minimum" due process requirements mandated by the Michigan Supreme Court in this case.

The decision below also exposes insurers to the requirements of substantive due process, equal protection and other constitutional constraints and to expensive litigation and possible liability for claimed violations of laws embodying these substantive rights.

In light of these potential ramifications, the continued viability of no-fault insurance itself is also threatened. No-fault coverages are an alternative to the traditional tort system of compensation, which has come under increasing attack in recent years,[30] and they have the potential for substantial social benefits, including a sizable reduction in the cost of automobile insurance.[31] Compulsory coverage is generally believed to be essential to the realization of these benefits through operation of a comprehensive and equitable no-fault insurance system.[32] If this

30. *See, e.g.,* Pub. L. No. 90-313, 82 Stat. 126 (1968). This Joint Resolution passed by Congress in 1968, embodies the following findings on the traditional tort system of automobile accident compensation:

> ". . . suffering and loss of life resulting from motor vehicle accidents and the consequent social and economic dislocations are critical national problems.
>
> ". . . there is growing evidence that the existing system of compensation is inequitable, inadequate and insufficient and is unresponsive to existing social, economic, and technological conditions.
>
> ". . . there is needed a fundamental reevaluation of such system, including a review of the role and effectiveness of insurance and the existing law governing liability."

31. After an in depth study of the traditional tort compensation system, Professor Jeffrey O'Connell urged adoption of no-fault automobile insurance throughout the United States, citing the following advantages of such a system, among others:

> "Perhaps the most significant advantage of all under no-fault auto insurance will be its lower price. It now seems indisputable, on the basis of information from a variety of sources and actuarial studies, that no-fault auto insurance can be designed to pay many more people at substantially less cost. That this is so stems from the prodigious waste of the present system." J. O'Connell, *The Injury Industry* at 110 (1971).

32. *See, e.g.,* Keeton and O'Connell, *Basic Protection for the Traffic Victim,* at 341-43 (1965).

Court fails to reverse the erroneous decision below, the staggering burden and cost of instituting the procedural mechanisms mandated by the Michigan Supreme Court will undoubtedly dissuade other states from adopting compulsory no-fault insurance despite these substantial benefits to consumers.

Finally, the Michigan Supreme Court's ruling on state action has implications which reach far beyond the insurance industry. Many businesses are regulated in ways which establish a nexus between their activities and the state which is at least as strong as the nexus between automobile insurers and the State of Michigan. Further, many of the services provided by such industries are at least as necessary to the public as driving an automobile.[33] Thus, these businesses and their customers are also threatened by the ominous impact of the decision below, which extends the constitutional constraints of due process far beyond the limitations set by this Court and well into the zone now reserved for private enterprise.[34]

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33. Some of the businesses which involve services which are at least as essential as insurance and which are subject to similar degrees of regulation to that imposed upon insurers by the Michigan statutes were enumerated by this Court in *Jackson*:

> "Doctors, optometrists, lawyers, Metropolitan [Edison Co.], and . . . [an] upstate New York grocery selling a quart of milk are all in regulated businesses, providing arguably essential goods and services, 'affected with a public interest.' We do not believe that such a status converts their every action, absent more, into that of the State." 419 U.S. at 354. (Footnote omitted.)

34. This Court itself has recognized the limitless scope of a decision like the one below by pointing out in *Jackson, supra,* that:

> "If the mere existence of this regulatory scheme made Metropolitan's action that of the State, then presumably the actions of a lone Philadelphia cab driver could also be fairly treated as those of the State of Pennsylvania." 419 U.S. at 350 n.7.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment and opinion of the Michigan Supreme Court.

Respectfully submitted,

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